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No. 43

# Supreme Court of the United States

OCTOBER TERM, 1932

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WILLIAM GRAU,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH DISTRICT.**

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## BRIEF FOR THE PETITIONER

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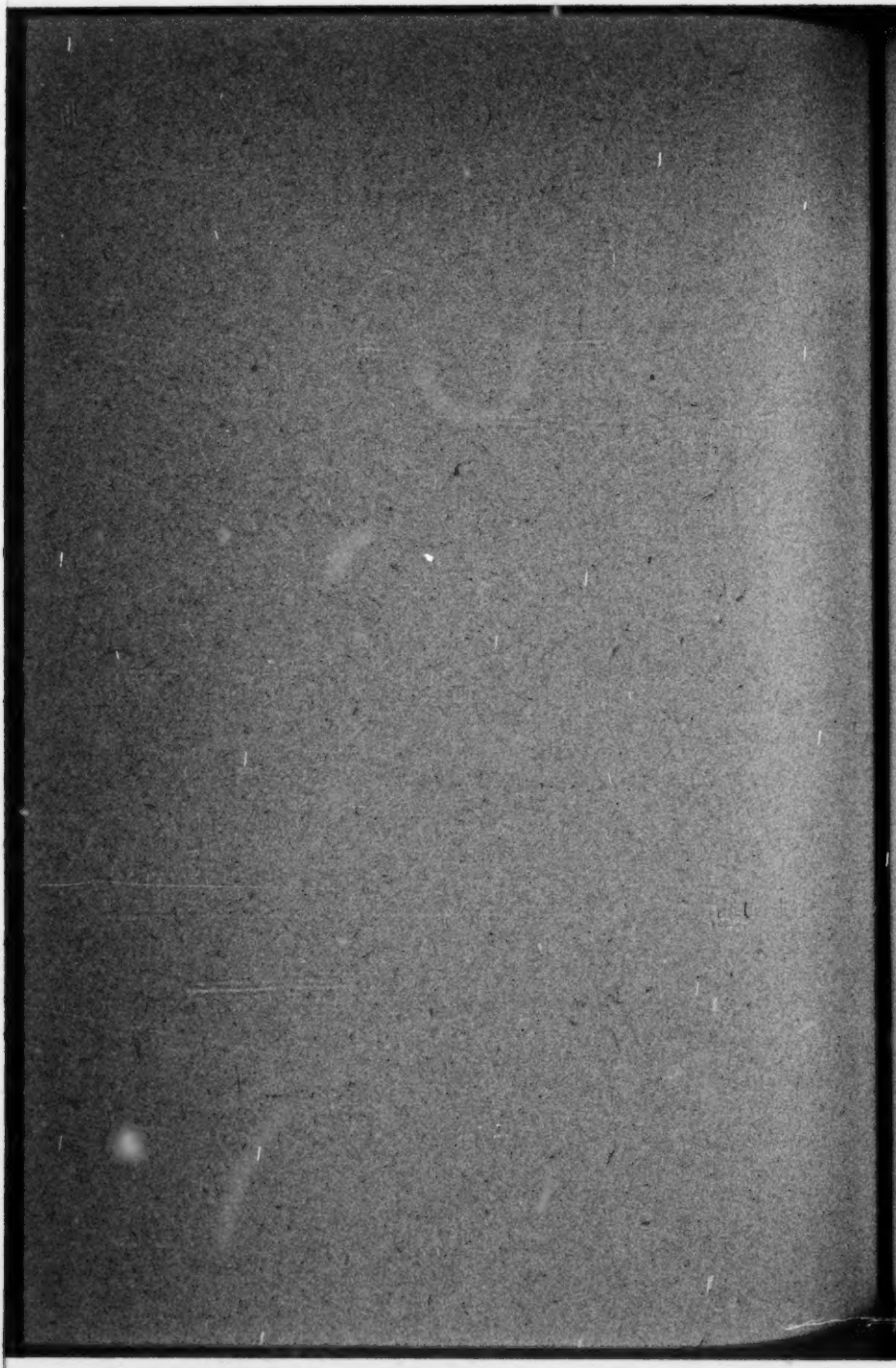
CHARLTON B. THOMPSON,
STEPHENS L. BLAKELY,
Both of Covington, Kentucky.
*Attorneys for Petitioner.*



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## BRIEF FOR PETITIONER

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### THE OPINION OF THE COURT BELOW

There was no opinion by the District Court. The opinion of the Circuit Court of Appeals (R. 25-27) is reported in 56 Fed. (2d) 779.

### GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The judgment of the Circuit Court of Appeals was entered March 11, 1932. (R. 25.) The petition for certiorari was filed

April 21, 1932, and was granted May 23, 1932. The case raises questions as to the legality of a warrant issued to search a private residence, and involves a construction of the Fourth and Fifth Amendments to the Constitution, of Section 24, Title II, of the National Prohibition Act, and of Section 6, Title XI, of the Act of June 15, 1917, known as the Espionage Act. These provisions were all construed by the Court below against the contentions of the petitioner.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

## STATEMENT OF CASE

The petitioner was indicted under the National Prohibition Act and tried at the October, 1931, term of the District Court of the United States for the Eastern District of Kentucky. The indictment contains two counts. The first count charges the petitioner with the unlawful manufacture of whisky. The second count charges him with the possession of property designed for the unlawful manufacture of intoxicating liquors (R. 1-2). The indictment contains no count charging the sale of liquor. At the trial the petitioner was found guilty generally (R. 16), and was sentenced to be confined in the penitentiary at Atlanta for a period of five years (R. 18).

All the evidence for the prosecution was secured by means of a search warrant under which the private residence of the petitioner was searched by federal officers (R. 8 & 22-23). Before the trial the defendant filed his petition to quash the search warrant and to suppress the evidence and information secured through the illegal search thereunder (R. 3). The petition was overruled and an exception saved (R. 3).

The evidence secured through the search was admitted at the trial over the objection and exception of the defendant (R. 22). At the close of the evidence for the United States the Defendant moved for a peremptory instruction to find him not guilty on the ground that all the evidence had been illegally obtained. The motion was overruled and an exception saved (R. 23). The defendant offered no evidence (R. 23).

That the premises searched were the private residence of the petitioner, not used in part or at all for any business purpose, as alleged in the petition to quash the search warrant (R. 8), is not disputed. All three witnesses for the United States testified at the trial that the premises were the defendant's private residence (R. 22-23), and the Court so instructed the jury (R. 24).

The defense was based entirely on the invalidity of the search warrant and on the admission of the evidence secured through the search under it. The warrant (R. 4-5) was challenged in the petition to quash (R. 3-11) on two grounds: *first*, that the warrant is illegal on its face because it does not state the particular grounds or probable cause for its issual as required by Section 6, Title XI, of the Espionage Act; and, *second*, that the affidavits are insufficient because they state no facts showing sales of liquor in the residence searched.

I. The grounds for its issual are stated in the opening lines of the search warrant (R. 4). It recites that affidavits had been filed by F. M. Curtis and H. S. Sandlin,

> "alleging that intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon the premises hereinafter described," etc.

It is contended by the petitioner that this language is a mere conclusion and does not state the particular grounds or probable cause for the issual of the warrant, as required by Section 6 of the Act of June 15, 1917, *supra*.

II. The only affidavit which states any facts, and the only one considered by the Circuit Court of Appeals (R. 26) is the affidavit of F. M. Curtis (R. 9), which reads as follows:

> "Now comes F. M. Curtis, P. A., and makes oath and states that on or about October 14th, 1931, he went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whisky, and what appeared to be corn sugar up to and into the place, and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place and he says there is a still and whisky mash on the premises; said premises being known as No. 18 Lorraine Court (Woodlawn) Newport, Campbell County, Ky."

It is contended by the petitioner that this affidavit is insufficient to justify the warrant to search his residence because it contains no evidence of sales on the premises as required by Section 25, Title II, of the National Prohibition Act, *supra*.

The Circuit Court of Appeals held that the search warrant complied with the requirements of Section 6 of the Act of June 15, 1917 (R. 26), and that the affidavit was sufficient under Section 25, Title II, of the National Prohibition Act (R. 26-27). The judgment of the District Court was affirmed by the Circuit Court of Appeals (R. 25).

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The Fifth Amendment to the Constitution of the United States provides in part:

> "No person shall be * * *, nor shall be compelled in any criminal case to be a witness against himself."

Title XI of the Act of June 15, 1917, 40 Stat. 228, et seq., Sections 3, 4, 5, 6 and 12 provide as follows:

"*Section 3:* A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and place to be searched."

"*Section 4:* The judge or Commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them."

"*Section 5:* The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist."

"*Section 6:* If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States, duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly

authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner."

"*Section 12:* When the officer takes property under the warrant, he must give a copy of the warrant together with a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property."

Section 25, Title II, of the National Prohibition Act, 41 Stat. 305, provides in part:

"A search warrant may issue as provided in Title XI of Public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the Court may make thereof. * * * No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house."

Section 6 of the Act of November 23, 1921, Supplemental to the National Prohibition Act, 42 Stat. 222, provides in part:

"*Section 6:* That any officer, agent, or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction

thereof shall be fined for a first offense not more than $1,000, and for a subsequent offense not more than $1,000 or imprisoned not more than one year, or both such fine and imprisonment.

## SPECIFICATIONS OF ASSIGNED ERRORS TO BE URGED

The Assignments of Errors to be urged are (R. 20):

1st: The Court erred in denying the petition and overruling the motion of the defendant made in advance of the trial to quash the search warrant herein and to suppress all evidence and information obtained by the unlawful search of the defendant's residence thereunder, said search having been made in violation of the Fourth Amendment to the Constitution of the United States and of certain statutes of the United States and the introduction of evidence so secured being in violation of the Fifth Amendment to the Constitution of the United States and of said statutes, all of which is fully set out in said petition. To said order overruling this motion, the defendant, William Grau, excepted.

2nd: The Court erred in admitting over the objection and exception of the defendant the testimony of F. M. Curtis, H. B. Sandlin and J. T. Tartar concerning the information secured in the illegal search of defendant's residence.

3rd: The Court erred, over the exception of this defendant, in overruling the motion made at the conclusion of the evidence of the United States to instruct the jury peremptorily to find the defendant not guilty under each count of the indictment on the grounds:

Second: That all of the evidence introduced at the trial was illegally obtained by an illegal search of the defendant's residence in violation of said statutes of the United States and of the Fourth and Fifth Amendments to the Constitution of the United States.

## ARGUMENT

### I

**The search warrant is invalid on its face because it does not state the particular grounds or probable cause for its issual as required by Section 6, Title XI, Act of June 15, 1917.**

THE MEANING OF SECTION 6, TITLE XI, ACT OF JUNE 15, 1917.

Title XI of the Act of June 15, 1917, known as the Espionage Act, is adopted by Section 25, Title II, of the National Prohibition Act as follows:

> "A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress approved June 15, 1917."

Section 6 of the Act of June 15, 1917, quoted above, requires that the search warrant shall state "the particular grounds or probable cause for its issue." The only grounds for the issual of the warrant here involved are set out in its first paragraph (p. 4) as follows:

> "Whereas, F. M. Curtis and H. S. Sandlin, has made oath as complainant, and has presented his written affidavit, duly subscribed by him, before the undersigned, Edw. W. Pflueger, U. S. Commissioner for the Eastern District of Kentucky, alleging that intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon the premises hereinafter described,"

This language is a mere conclusion. If regarded as a quotation from the affidavits it shows that the affidavits stated no facts and were insufficient. Affidavits for search warrants must state evidence that would be admissible at a trial. *Giles* v. *United States*, 284 Fed. 208 (C. C. A. 1st C.); *Lochnane* v. *United States*, 2 Fed. (2d) 427 (C. C. A. 9 C.); *Wagner* v. *United States*, 8 Fed. (2d) 581, 583 (C. C. A. 8

C.); *Hagen* v. *United States*, 4 Fed. (2d) 801, 802 (C. C. A. 9 C.). If the recital is to be regarded as a *conclusion* from the facts stated in the affidavit the warrant is defective because it does not state the particular grounds for its issual. In either event the warrant is unlawful.

That such a general conclusion is not sufficient under Section 6 of Title XI of the Espionage Act is clear from a reading of that section in connection with Sections 3, 4 and 5. These prior sections all emphasize the necessity of sworn facts as the basis for a search warrant. It is argued by the Respondent that the words "particular grounds" in Section 6 are merely the grounds which the facts must tend to establish under Section 5, and that therefore a statement of the *offenses* charged is sufficient. (Brief in opposition to certiorari p. 8). But this reasoning wholly fails to account for the word "particular" used for the first time in Section 6. This word was inserted apparently for the very purpose of preventing the construction urged by the Respondent. Having in Sections 3 and 5 used the words "probable cause," "grounds" and "facts," the framers of the law through fear that a mere requirement that the "grounds" be stated might be construed as meaning grounds in the sense of conclusions, added the word "particular." By "particular grounds" is meant the grounds of the particular case. And the grounds of the particular case are evidently the *facts stated in the affidavits*, because these facts are the only basis for the issual of the warrant.

The construction urged by the Respondent ignores the very purpose of the provision. Like the other provisions of the Espionage Act it was meant as a check on the improvident issual of search warrants. Search warrants have always been regarded as the most drastic process of the law. For

this reason their issual has from the beginning been regulated by careful restrictions. Checks are applied to test the regularity of the proceedings. Now, what possible check could be supplied by a requirement that the Commissioner state only his own conclusions in the warrant? His conclusions are no test of the sufficiency of the proof. A Commissioner with a vivid imagination might conclude from an affidavit that a man was seen carrying a package from a house, that liquor had been sold there. A recital in the warrant that the affidavit alleged that liquor was being sold on the premises would mean nothing, but a recital of the fact on which the conclusion was based would show that the writ was improperly issued.

The proceedings in the case at bar well illustrate the point. The warrant states the conclusion that the affidavits allege that liquor has been and is being sold on the premises described. But in fact the affidavits do not so allege. It is admitted that the affidavits do not show sales of liquor on the premises. The brief for the Respondent in opposition to certiorari says at page 14: "It is doubtful if the facts therein recited were sufficient to show probable cause that liquor was being sold on the premises." Thus the whole basis for the search of a residence as stated in the warrant is repudiated. What purpose this incorrect recital can serve it is difficult to see. And yet it is argued that it states the particular grounds for the issual of the warrant.

The warrant must plead the case. The evident purpose of Congress was to require the warrant to show on its face whether it was based on sufficient evidence. This purpose is not satisfied by recitals that the affidavits allege that liquor and property designed for its manufacture have been and are being kept, used and sold on the premises described.

That language, besides being a conclusion, is at most a *general* statement which would cover almost every case under the National Prohibition Act. It can not be construed as the particular grounds. "Particular" means "specific," "peculiar," "not general." Webster's International Dictionary.

A recital substantially like the recital in the present warrant was condemned in *Giles* v. *United States,* 284 Fed. (C. C. A. 1st C.). The warrant in the *Giles* case states (p. 213 Report) that an affidavit had been made before the commissioner,

> "by D. T. Lordan, Prohibition Agent, alleging that the laws of the United States, namely the National Prohibition Act, have been and are being violated by unlawfully possessing and selling intoxicating liquor at the drug store of D. F. Giles on North Main Street," etc.

The opinion of the Court says at page 215:

> "Nor in the search warrant used in this case was there adequate compliance with the requirements of Section 6, supra, requiring that the warrant itself should state the particular grounds or probable cause for its issue * * *"

This language shows clearly that under Section 6 the facts must be recited in the warrant, because it did recite the conclusions.

That the sworn facts in the affidavits were intended to be stated in the warrant as a check on federal officers, is clear from other words in Section 6. It provides that if the grounds exist the Judge or Commissioner must issue a warrant "stating the particular grounds or probable cause for its issue, and *the names of the persons whose affidavits have been taken in support thereof.*" (Italics ours.) By

requiring both the specific grounds for its issual and the names of the witnesses to be set forth, the section prevents any additions or alterations in the record to conform to the evidence disclosed by the search. If the warrant states the facts on which it is based and the names of the witnesses, no new affidavits can be filed and no changes can be made in the warrant, because Section 12 of the Act, quoted above, requires that the officer who seizes property must leave a copy of the warrant with the person in whose possession the property was found.

Sections 6 and 12 furnish a complete check on irregularities. They also prevent surprise at a hearing on the warrant, because the whole case is stated on its face. But to achieve this end both Section 6 and Section 12 must be complied with. In the case at bar a copy of the warrant was delivered to the petitioner at the time of the search. Section 12 was thus complied with, but Section 6 was not. The warrant did not state the *facts* contained in the affidavits. These affidavits could have been changed at will and remained consistent with the recital in the warrant. This recital furnished no check on irregularities. It served no purpose at all. Its conclusions would have embraced almost any set of facts in affidavits charging offenses under the National Prohibition Act.

### The Meaning of Section 6 is Shown by Other Statutes Drawn From the Same Source.

Light is thrown on the meaning of Section 6 by comparing it with other statutes apparently based on the common law. It appears in the note at page 485 of Quincy's (Mass.) Report, that in 1762 the General Court of Massachusetts passed a bill authorizing a writ or warrant of assistance to

Sheriffs and other officers upon oath in writing, with the name of the person informing and the place informed against, and not otherwise, in the form set out, as follows:

> "Whereas A. B. of his Majesty's Customs hath this day made complaint on oath that (*setting forth the complaint and oath*, with the name of the person complained of)," etc. (Italics ours.)

The Governor did not approve the bill, but it shows the importance attached to having the facts recited in the warrant, and probably embodies the views of the General Court on the common law. It passed the year after Otis had made his celebrated argument against general writs of assistance, in the Colony where the chief struggle against these writs was made. The purpose of the bill was evidently to restore the safeguards of the common law to search warrants.

An old statute of Massachusetts has a similar provision. From the report in *Guenther* v. *Day*, 6 Gray 490, it appears that the Statutes of 1855 C. 215, para. 25 required two complainants for a warrant to search a dwelling and provided that "the offense both in the complaint and warrant shall be *fully, plainly and substantially described.*" (Italics ours.) This language clearly requires the facts to be recited in the warrant.

The requirement that the facts be recited in the warrant is plainly stated in the Massachusetts Prohibition Act of 1922. Chapter 427, Section 49, page 479, "Acts and Resolves of Massachusetts" (1922) after stating the proof necessary for a warrant to search a dwelling house, says:

> "Such complainant shall in his oath state the facts and circumstances on which his belief is founded, *and such allegations shall be recited in the complaint and warrant.*" (Italics ours.)

A similar provision apparently derived from the same source and designed for the same purpose, is found in Section 9164 Compiled Laws of Michigan (1929). The section says in part:

> "The warrant for search shall be directed to the proper officer and shall *recite all the material facts alleged in the affidavit,* and shall describe the things to be searched for and the place to be searched. A warrant for search and seizure in substantially the following form shall be sufficient: (Italics ours.)
>
> "The State of Michigan ..... County, ss:
>
> "To ..... Greeting:
>
> "Whereas there has been filed with the undersigned an affidavit (*here set out the material facts alleged in the affidavit.*" (Italics ours.)
>
> "These are, therefore, to command you," etc.

Search warrants failing to set out the material facts contained in the affidavits as required by the Act, were held illegal in *People* v. *Moten,* 233 Mich. 169, and in *People* v. *Galnt,* 235 Mich. 646. In reversing a conviction based on evidence secured by such a warrant the Court in *People* v. *Moten* said at page 172:

> "It is the general rule that laws authorizing invasion of private premises and the sanctity of the home by search and seizure proceedings are to be strictly construed."

It seems probable that under the common law the entire affidavit must be recited in the warrant. The purpose of statutes which require only the material facts or the particular grounds to be stated are meant to secure brevity, and are not designed to authorize the substitution of a magistrate's conclusions for the common law requirement that the facts be recited.

SECTION 6, TITLE XI, ACT OF JUNE 15, 1917, IS MANDATORY.

That the provisions of Title XI of the Espionage Act are mandatory is supported by overwhelming authority. On this point the text writers seem to be in full accord. These provisions are mandatory because they are designed to prevent the abuse of the most drastic process of the law. It would be futile to adopt a set of provisions for the purpose of regulating officials and then leave their enforcement to the discretion of the very officials sought to be controlled.

Thus, it is laid down generally that both statutory and common law rules must be strictly followed, to make the search warrant valid. The reasons given are the drastic nature of the process and the humiliating effect of its execution. *Cooley's Constitutional Limitations,* 8th Ed., page 618; *Corpus Juris,* vol. 56, para. 108, p. 1209; *Ruling Case Law,* vol. 24, p. 711, quoted in *United States* v. *Rembert,* 284 Fed. 996 (D. C. Texas).

This Court has used language which seems to indicate that the provisions of the search warrant act are mandatory. In *Dumbra* v. *United States,* 268 U. S. 435, the opinion says at page 439:

> "Title XI of the Public Law approved June 15, 1917, known as the 'Espionage Act' referred to in Section 25 of the National Prohibition Act, lays down the rules which must be followed upon the issue of a search warrant."

In *Steele* v. *United States,* 267 U. S. 498, the opinion at page 501 discusses the provisions of the Act in a way that indicates that they must be followed.

These provisions are certainly mandatory in form. The sections here chiefly involved are Sections 3, 4, 5 and 6. Section 3 says that a search warrant *can not* be issued but

upon probable cause. Each of the Sections 4, 5 and 6 says that the things set out *must* be done. So does Section 12. So do the other sections whenever a duty is imposed.

The provisions of Title XI of the Espionage Act form a carefully drawn Code consisting of twenty-two sections. They carry out in detail the principles stated generally in the Fourth Amendment. *Giles* v. *United States,* 284 Fed. 208, *supra.* They are based on the common law and are taken largely from the New York Code of Criminal Procedure, para. 791, et seq. *United States* v. *Yuck Kee,* 281 Fed. 228 (D. C. Minn.); *United States* v. *Maresca,* 266 Fed. 713 (S. D. N. Y.); *Giles* v. *United States,* supra. The sections of the New York Code are taken from the common law. In *People* v. *Kempner,* 208 N. Y. 16, the Court says at page 22:

> "The basis for the search warrant prescribed by the Code, is, however, the same in general character as stated in the Revised Statutes and as established by the old English practice."

Corpus Juris says, vol. 56, para. 108:

> "The federal statute regulating the issuance of search warrants is declaratory of the common law insofar as the procedural sections of the Act are concerned."

The Fourth Amendment must be considered in light of the common law. It specifies a few of the requirements for a lawful search and covers the other requirements by prohibiting unreasonable searches. The Amendment does not specifically say that the affidavits must contain statement of facts, and yet a search under a warrant based on the opinion of a witness would be an "unreasonable" search. It was so held before the Espionage Act in *Ripper* v. *United States,* 178 Fed. 24 (C. C. A. 8 C.). The Amendment does

not say that a return must be required, and yet this requirement of the common law would have been essential. The search warrant Code merely simplifies the procedure and makes it definite. Substantially it is a part of the Fourth Amendment.

A search under a warrant issued in violation of the federal act is an unreasonable search under the amendment, and raises a constitutional question. In *The People* v. *Holcomb*, 3 Parker's Criminal Reports (N. Y.) 656, decided in 1858, the Court says at page 666:

> "Courts should construe statutes in relation to search warrants strictly and see that the specific directions of these statutes are rigidly followed. A search for and seizure of property, not made in the cases and according to the exact mode prescribed by statute, is an unreasonable search and seizure, the right to be secured against which should not be violated (Bill of Rights 2 R. S. 302 para. 11; Const. U. S. Amend. Art. 4)."

All searches that are unlawful are unreasonable. *State* v. *Wills*, 91 W. Va. 659.

The mandatory character of search warrant provisions is plainly upheld in *Guenther* v. *Day*, 6 Gray (Mass.) 490, cited above. This was an action in trespass against a constable who had served a defective search warrant. The defect consisted in the failure of the warrant to recite the names of the two complainants as required by law. The warrant was held illegal. The entire opinion, which was delivered by Chief Justice Shaw, is as follows:

> "The Statutes require the complaint to be fully set forth in the warrant. Sts. 1855, C. 215 para. 25; C. 397, para. 1. It is not so set forth in the warrant; the complainants are nowhere named, and of course the order in the warrant to summon the 'complainants' not

named, to testify, is inoperative and void; and therefore the warrant is erroneous and affords no justification to the defendants."

*Hussey* v. *Davis,* 58 N. H. 317, decided in 1878, was an action for trespass which the defendant sought to justify as a deputy sheriff executing a search warrant. The warrant had failed to direct the officer to make a return as required by statute. The Court held the warrant defective notwithstanding the fact that the return had been made. The Court said:

> "No search warrant can be lawfully issued but in cases and with the formalities prescribed by law. Bill of Rights, Art. 19. The Common law of search warrants affirmed in the Bill of Rights is of extraordinary strictness. Cooley Const. Lim. 303; Cooley on Torts 295 * * *. In this case as the warrant did not require the officer to make return of his proceedings or of an inventory, it is erroneous and affords no justification to the defendant. *Guenther* v. *Day,* 6 Gray 490. He made return of his proceedings with the prescribed inventory; but the defect in the warrant was not cured by his doing what a valid warrant would have required him to do."

On the mandatory character of the Search Warrant Code, and on the construction of the phrase "particular grounds" in Section 6, our position is fully supported in *Giles* v. *United States,* 284 Fed. 208 (C. C. A. 1st C.). The case involved the search of a drug store under a search warrant which was attached as illegal. The Circuit Court of Appeals reversed the judgment of conviction on the ground that the search warrant was defective. One of the defects pointed out in the opinion was the failure of the warrant to state the particular grounds for its issual. The recital in the warrant was substantially like the recital in the warrant here involved. The warrant condemned in the *Giles* case

states (p. 213 Report) that an affidavit had been made before the Commissioner,

> "by D. T. Lordan, Prohibition Agent, alleging that the laws of the United States, namely the National Prohibition Act, have been and are being violated by unlawfully possessing and selling intoxicating liquor at the drug store of D. F. Giles on North Main Street."

The Court at page 215 holds this recital insufficient under Section 6 as above pointed out. In an earlier part of the opinion the Court says that the provisions of the search warrant act must be strictly followed. Concerning these provisions it is said at page 212:

> "This careful codification of the search warrant law leaves little or nothing for implication either as to the extent of the power or the method of its exercise. It authorizes search and seizure of stolen and embezzled property in conformity with a practice that probably goes back to Lord Coke's time. * * *
>
> "The provisions of Sections 3-6 are declaratory of the most carefully guarded previous judicial determinations of the meaning and scope of the Fourth Amendment to the Constitution of the United States, and of similar provisions in State Constitutions. It need hardly be pointed out that a process issuing to an administrative official which will authorize him at any time of day or night to enter the home or office of any person, breaking doors, windows and opening by force anything within the premises for the purpose of taking possession of articles belonging either to the occupant or falling within the category of outlawed property, is a power capable of such oppressive and liberty-destroying use that it should be strictly guarded and exercised."
>
> "In Archbold's Criminal Practice and Pleading at p. 131 it is said:
>
> 'The proceedings upon search warrants should be strictly legal, for there is not a description of process known to the law the exercise of which is more dis-

> tressing to the citizen. Perhaps there is none which excites such intense feeling in consequence of its humiliating and degrading effects.' "

The identical wording from Archbold just quoted is contained in volume 24, Ruling Case Law, p. 771, referred to in *United States* v. *Rembart*, 284 Fed. 996 (D. C. Tex.), cited above but not quoted. And exactly the same language is used by the Court in *Reed* v. *Rice*, 2 J. J. Marshall (Ky.) 44, decided in 1829.

The effect of the *Giles* case appears in two later cases before the same Court: *Murby* v. *The United States*, 293 Fed. 849, and *Gandreau* v. *United States*, 300 Fed. 21. In both cases the search warrants in a few lines set out the facts stated in the affidavits.

Again in *Leonard* v. *United States*, 6 Fed. (2d) 353, the Circuit Court of Appeals for the First Circuit laid down the rule that the Statute must be strictly construed, in the following language at page 355:

> "Statutes authorizing search warrants are strictly construed. *Guenther* v. *Day*, 6 Gray (Mass.) 490; *Hussey* v. *Davis*, 58 N. H. 317; *Giles* v. *United States*, 284 Fed. 208 (C. C. A.). At common law the direction in the warrant was regarded as an essential part of it" (citing cases). "The directions in these warrants were defective and rendered them invalid."

In *Perry* v. *United States*, 14 Fed. (2d) 88 (C. C. A. 9 C.), referring to *Leonard* v. *United States*, supra, the Court said at page 89:

> "In our opinion that case is well founded upon the principle that statutes which authorize search warrants must be strictly construed. We therefore hold that the direction in the search warrant was an essential part of it, and that because the plain language of the statute was disregarded * * * the objections to the warrant and

to the use of the evidence obtained and the search were well taken and should have been sustained. *United States* v. *Dziadus*, (D. C.) 289 Fed. 837; *United States* v. *Innelli*, (D. C.) 286 Fed. 731."

In *United States* v. *Dziadus*, 289 Fed. 837 (D. C. W. Va.), the Court after referring to Section 25, Title II, of the National Prohibition Act, says at page 839:

> "The warrant at bar must comply with all the provisions of these Congressional directions, or it must be held invalid, and the evidence secured thereunder held inadmissible against the petitioner."

*Maccieno* v. *United States*, 270 U. S. 629, involved a construction of Section 6 of the Act of June 15, 1917. One ground for the attack on the search warrant in that case was that it did not state the facts on which it was issued. In its statement of the grounds it is substantially like the warrant here involved, and is set out on page 2 of the petition for certiorari in that case. The first paragraph of the warrant recites the grounds in the following language:

> "Whereas complaint on oath, and in writing supported by affidavit, has this day been made before me, Martin J. Monahan, a United States Commissioner for said District, by J. G. Plappert alleging that the laws of the United States, namely, the National Prohibition Act, Oct. 28, 1919, Revised Statutes, have been and are being violated by unlawfully using the premises, being the premises at 2570 East 39th Street, Cleveland, Ohio, and the rooms and places in and about the 2 story frame building, and all outbuildings on the premises, for the unlawful possession and sale of liquor, to-wit: whisky, spirits, etc., containing 1.2 of 1 per cent or more of alcohol by volume for beverage purposes. A soft drink place is on the first floor of the main building, basement below and other rooms above, all of which are used in part or solely for the unlawful sale of said liquor. The premises are used and occupied by person or persons, whose name or names are unknown to

> affiant and being situate in the County of Cuyahoga, and State of Ohio, and within the district above named."

The petition for certiorari in the *Maccieno* case says at page 3:

> "A reading of the warrant will indicate that it does not contain any facts; and that all it sets forth is that the National Prohibition Law was being violated."

The brief of former Solicitor General Mitchell, which confessed error, does not discuss the meaning of the words "particular grounds" in Section 6, but it clearly indicates that he regarded the section as mandatory. For on page 4 the brief quotes the provision that the search warrant shall command the officer to whom it is directed "to search the person or place named for the property specified, and to bring it before the judge or commissioner"; and points out as a fatal objection, that the warrant fails to comply with this direction of the Statute. The brief then says that the same form of warrant was condemned in *Giles* v. *United States,* 284 Fed. 208, cited above. The judgment against Maccieno was reversed. There was no opinion. The grounds of the reversal must be gathered from the petition for certiorari and from the brief of the Solicitor General. The report at 270 U. S. 629 says merely:

> "Petition for certiorari granted and the judgment of the Circuit Court of Appeals reversed on confession of error by the Government, with direction to remand the case to the United States District Court for the Western District of Ohio for a new trial."

The brief opposing certiorari in the case at bar says (p. 6) that provisions like Section 6 in the Espionage Act have almost uniformly been held directory and not mandatory. This statement, we believe, is against overwhelming

authority. It is partly supported only by some rather equivocal decisions on Sections 10, 12 and 13 of the Act. No authority is pointed out which even suggests a doubt as to the mandatory character of Sections 3, 4, 5, or 6, or of the Act as a whole. Section 12, set out in full above, was squarely held to be mandatory in *Murby* v. *United States,* 293 Fed. 849 (C. C. A. 1 Circuit). In that case the return on the warrant failed to show that a copy had been delivered to the defendant. In holding this omission to be fatal, the Court says at page 853:

> "If in fact this provision (Section 12) was complied with, the return should have shown it affirmatively. If it was not complied with the search warrant proceedings were void and the evidence obtained thereby inadmissible."

The Court suggests that if the copy had been in fact delivered the return could have been amended, but that this was not done even after the omission had been pointed out. *United States* v. *Kraus,* 270 Fed. 578 (S. D. N. Y.) and *Rose* v. *United States,* 274 Fed. 245, relied on by the Respondent, are cited on this point.

*Gandreau* v. *United States,* 300 Fed. 21 (C. C. A. 1 C.) is to the same effect both as to the mandatory character of Section 12 and as to the right to amend the return. *Giles* v. *United States,* 284 Fed. 208, before cited, also holds that the return must show the delivery of a copy.

In *Johnson* v. *United States,* 46 Fed. (2d) 7 (C. C. A. 6 C.), cited by the Respondent, the Court did not hold Section 12 to be directory. In that case a copy of the warrant had been delivered and the only objection under Section 12 was that the copy referred to the wrong judicial district. The Court conceded that a true copy must be delivered, but held the error involved was too trivial to be fatal.

The other point in the case was under Section 10 which provides that a direction shall be inserted in the warrant that it must be served in the daytime unless the affidavits are positive that the property is on the person or in the place to be searched. The warrant involved said: "This warrant shall be served at any time of ——." The Court held that since night was not mentioned, the direction in effect required a daytime search; and that the search having been made in the daytime was lawful. The decision therefore merely construes the language in the warrant and does not impair the force of Section 10.

*Nordelli* v. *United States,* 24 Fed. (2d) 665 (C. C. A. 9 C.) also relied on by the Respondent, does not hold that Section 12 is directory. It merely construes it as requiring the delivery of a copy of the writ not before the search but after it. The case also holds that the failure to make a complete return as required by Section 13 may be corrected on motion. The Court showed no intention to qualify its own former decision on the mandatory character of the Search Warrant Act, in *Perry* v. *United States,* 14 Fed. (2d) 88, above cited.

In *United States* v. *Yuck Kee,* 281 Fed. 228 (D. C. Minn.), before cited, it was held that both Sections 10 and 12 are mandatory, and the opinion states that the requirement for leaving a copy of the warrant grew up when it became no longer necessary to bring the owner before the magistrate with the property seized under the warrant. From this rule came Section 12 of the Federal Act.

It is true that searches have been upheld under warrants which improperly direct service in the day or night. But in all those cases the searches were actually made in the daytime. Where the warrant improperly directs the search to

be made in the day or night, and it is actually made in the nighttime, the search has been held illegal. *Siden* v. *United States*, 9 Fed. (2d) 241 (C. C. A. 8 C.); *Destefano* v. *United States*, 58 Fed. (2d) 963 (C. C. A. 5 C.).

A return on the warrant has always been regarded as necessary. In the bill passed by the General Court of Massachusetts in 1762 mentioned in the note at page 485 Quincy's Report, above cited, it was required that the return be made in seven days. The failure to direct a return was one of the points of attack made by Otis on general writs of assistance. He said in reciting his objections to the writ:

> "In the next place, it is perpetual; there is no return. A man is accountable to no person for his doings."

The cases cited by the Respondent involve in part matters of construction. Even where they tend to support the position of the Solicitor General, they show that the decisions are only on the exact point involved. Thus, *United States* v. *Callahan*, 17 Fed. (2d) 937, and *United States* v. *Kraus*, 270 Fed. 578, District Court cases, cited against us, both by inference state that Section 11, requiring the warrant to be returned within ten days, is mandatory. We submit that the cases cited in support of the directory character of the Search Warrant Code are of very little weight against the almost uniform authority that they are mandatory. This apparently was not questioned in the present case by the Court below. It merely held that Section 6 was satisfied by the recital in the warrant (R. 26).

## II

**The affidavits furnished no basis for the issual of the warrant to search a private residence because they state no facts showing sales of liquor on the premises.**

Neither of the two affidavits shows any sales of liquor on the premises. Section 25, Title II, of the National Prohibition Act provides in part as follows:

> "No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house."

There were two affidavits. The one made by H. B. Sandlin (R. 10) was not even considered by the Court below (R. 25-27). It is made on belief only and is clearly insufficient under *Byars* v. *United States,* 273 U. S. 28. Only the affidavit of F. M. Curtis (R. 9) was referred to in the opinion. It is the only one that states any facts. It reads as follows:

> "Now comes F. M. Curtis, P. A., and makes oath and states that on or about October 14, 1931, he went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whisky, and what appeared to be corn sugar up to and into the place, and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place, and he says there is a still and whisky mash on the premises; said premises being known as No. 18 Lorraine Court (Woodlawn), Newport, Campbell County, Ky."

This affidavit does not charge sales nor state that the premises were a private dwelling. So far as appears from the proceedings, the Commissioner may have issued the warrant in the belief that the premises were a store or a

warehouse, which might be lawfully searched on evidence of manufacture or possession of whisky.

The only statement of a definite fact is that the affiant smelled "odors and fumes of cooking mash coming from the premises." If this statement shows any offense it shows manufacture. But evidence of manufacture, even aided by evidence that cans *commonly* used in handling whisky, and *apparently* heavily loaded, were hauled away, does not prove sales on the premises. This is practically conceded by the Respondent. The brief in opposition to certiorari (p. 14) says with reference to the affidavit: "It is doubtful if the facts therein recited were sufficient to show probable cause that liquor was being sold on the premises." It is then argued that the affidavit was nevertheless adequate to establish probable cause for believing that the dwelling was being used "as a headquarters for the merchandising of liquor."

The same idea is the basis of the decision of the Circuit Court of Appeals. The opinion clearly indicates that the Court did not regard proof of actual selling necessary to justify the search warrant. It does say (R. 27) that the National Prohibition Act does not authorize a search warrant for a dwelling merely because it is being used for the manufacture of liquor, but that Section 25 is satisfied by an affidavit establishing probable cause for the charge that the premises are being used for the prosecution of commercial sales. The opinion then proceeds (R. 27):

> "One does not manufacture liquor for his own use in such quantities as to require wholesale deliveries of corn sugar or the other ingredients of mash; and whisky so manufactured for personal use is not ordinarily shipped from the premises in cans, by automobile or truckload; nor are the cans in such case subsequently returned for refilling. Under the criterion established by *Dumbra* v. *United States* such allegations are clearly

> adapted to warrant the belief that the dwelling is being used as a headquarters for the merchandising of liquor. This, we reaffirm, is sufficient compliance with the requirement of Section 25 that a dwelling may be searched if 'being used for the unlawful sale of intoxicating liquor'."

This language seems to assume that the affidavit states that there were wholesale deliveries of corn sugar to the house and that whisky was shipped away in cans by truckload. The affidavit says only that what *appeared* to be corn sugar was hauled to the place, and that cans *commonly* used in handling whisky and apparently heavily loaded were hauled away in the same car or truck. This at most merely states the belief of the affiant that corn sugar was hauled in and that whisky was hauled away.

The affidavit shows that the agent did not *know* that either of these things occurred. And it says nothing whatever about the amount of what appeared to be corn sugar or why it appeared to be corn sugar, nor about the number or the size or the appearance of the cans. If this sort of evidence is held sufficient to establish the grounds required by Section 25, it will not seriously tax the ingenuity of prohibition agents to make a case for the search of a residence wherever there is any evidence of manufacture.

Although the court below says that proof of manufacture is not sufficient to authorize a warrant to search a dwelling, it holds that the affidavit is sufficient, though the only definite statement of fact in the affidavit concerns manufacture.

Apparently Section 25 is thought by the Court below and by the Respondent not to require proof of sales, because it provides that a warrant shall not issue to search a dwelling, "Unless it is being used for the unlawful sale of intoxicating liquor," and does not specifically say that actual sales

on the premises must be proved. But clearly, in view of the obvious purpose of the section, this wording was intended not to broaden the rights of the Government, but to restrict them. The language "being used for the unlawful sale" would preclude a search warrant on proof of a single isolated sale, not showing a regular practice. It was evidently intended to confine searches of homes to cases of habitual selling, not to broaden the scope of the Act to include whatever is meant by "merchandising" as distinct from sales.

By the ordinary understanding of language, premises are used for the sale of liquor only when liquor is being sold on the premises. A place used for gambling is a place where gambling is actually conducted, and not where cards or gambling devices are manufactured or stored.

In the case at bar not only is there no evidence of a sale on the premises, but there is no evidence of a sale anywhere. This is tacitly admitted by the failure to include a sales count in the indictment (R. 1-2). To substitute evidence of manufacture coupled with an *opinion* of transportation for proof of sales is to defeat the whole purpose of Section 25. The National Prohibition Act leaves no opening for such a construction. It creates various offenses and then says that a warrant to search a residence shall be issued only for one of them, namely selling. It practically says that selling can not be inferred from proof of other offenses. If it could be Section 25 would be meaningless.

There is no doubt that Congress desired to reduce searches of homes to a minimum. As stated in *United States* v. *Berkeness*, 275 U. S. 147, 155:

> "But the emphatic declaration that no private dwelling shall be searched except under specified circumstances, discloses a general policy to protect the home against intrusion through the use of search warrants."

The policy is further emphasized by Section 6 of the Act of November 23, 1921, 42 Stat. 222, quoted above, which makes it a crime for any federal officer to search a private dwelling without a search warrant.

There is no way to enforce the exemption in Section 25, except to require as a basis for the search warrant evidence of sales on the premises.

That proof of actual sales must be made to authorize a warrant to search a private dwelling is squarely held in *Simmons* v. *United States*, 18 Fed. (2d) 85 (C. C. A. 8th C.). In that case the warrant for the search of a residence, recites, pages 88:

> "Proof by affidavit having this day been made before me by H. C. Coates that he believes intoxicating liquors are kept for the purpose of sale in the eight or nine room house on Sect. 22 Tp. 7 N. Range 12 East, in Okfuskee County, Oklahoma, owned by Ed. Holmer and occupied as a joint by Harris Simmons, said house being south and east of Paden on the right side of the road. That said affidavit shows that the place is a place where people congregate for the purpose of buying and selling intoxicating liquors, and is a place where people congregate seemingly sober and leave under the influence of intoxicating liquors."

The Court held the affidavit insufficient. The opinion (p. 88) says in part:

> "This warrant shows on its face that the proof upon which the said state judge based the finding of probable cause is the affidavit of Mr. Coates, and that such affidavit goes only to the extent of showing that Coates *believed* intoxicating liquors were kept for sale in a certain house. It does state that the affidavit shows the place is one where people congregated for the purpose of buying and selling intoxicating liquors and where people congregated sober and left under the influence of intoxicating liquor. This is based on affiant's belief,

> and there is nothing in the affidavit, as judged by the terms of the search warrant, to show actual sales or that Coates had any personal knowledge of sales."

On the same page (88) the Court says concerning the search of private dwellings:

> "The probable cause for the issuance of such warrant must be based on evidence of sales."

And at page 87 it says:

> "The search of the residence of a person is a serious matter, and the proceedings therefor must strictly conform with law, and not violate the Constitution of the United States."

**The Maccieno Case**

*Maccieno* v. *United States*, 270 U. S. 629, cited above, fully supports our contention that sales in a residence must be shown in order to justify a warrant for its search. It is true that there is no opinion in the case, but the facts, the petition for certiorari and the brief of the Solicitor General clearly disclose the questions necessarily decided. Aside from the attack on the warrant as not conforming to Section 6 of Title XI of the Espionage Act, the only point made by the petitioner was that the affidavits did not state facts. (Petition for certiorari p. 2.) The affidavit is set out on pages 3-4 of the petition for a writ of certiorari in that case and is referred to on page 5 of the brief of former Solicitor General Mitchell as being on page 24 of the record. The affidavit reads as follows:

> "Be It Remembered, That on this date, before me, the undersigned, a United States Commissioner for the Northern District of Ohio, Eastern Division, came J. G. Plappert, F. P. A., who being by me duly sworn, deposes and says that the laws of the United States, namely the National Prohibition Act, Oct. 28, 1919,

> Revised Statutes, are being violated by reason of the facts, to-wit: Affiant states that he has investigated the premises at 2570 E. 39th St., Cleveland, Ohio, and the rooms and places in and about the 2 story frame building, and all outbuildings located on the premises, and finds that all the same are used in part or solely for the unlawful possession and sale of liquor, to-wit, whisky, spirits, etc., containing 1.2 of 1% or more of alcohol by volume for beverage purposes. (A soft drink place and) connecting rooms are on the first floor of the main building, basement below and other rooms above, all of which are used in part or solely for the unlawful sale of said liquor. The premises are used and occupied by person or persons, whose name or names are unknown to affiant.
>
> ". . . . being premises of . . . . and being situated in the County of Cuyahoga and state of Ohio, and within the district above named."

This affidavit states no facts except that the affiant had investigated the premises involved. The brief of the former Solicitor General (p.5) expresses the opinion that no facts are set forth but conclusions only. On page 6, however, the brief comments on the oral testimony of the agent who made the affidavit, as follows:

> "The only investigation he had made was that he 'seen machines drive in on the premises,' and smelled the odor of mash, and 'seen men coming there and machines going away' and 'I was convinced there was something being sold there' (R. 13). He admits that he did not at any time see any actual sale of liquor made upon the premises; that the allegations in his affidavit were not based upon actual knowledge of sale, but were rather based 'upon a conclusion which I drew' (R. 14)."

This testimony was quoted for the evident purpose of showing that the conclusions in the affidavit were not even based on sufficient facts. In other words, if this testimony of the agent had been embodied in the affidavit, it would

not have been sufficient. The evidence that the witness saw machines drive to the premises, smelled the odor of mash and saw men going there and machines going away, did not show actual sales of liquor on the premises and was for that reason insufficient. Thus former Solicitor General Mitchell, in the language quoted from his brief, clearly discloses the opinion that proof of actual sales of liquor *on the premises* was necessary to justify a search of the residence. The judgment against Maccieno was reversed.

**The inconsistent positions of the government in the search warrant and the indictment.**

An anomalous situation necessarily results from treating such affidavits as sufficient to justify an inference of selling for *the purpose of search.* In the present case the evidence in the affidavit, even with the evidence secured by the search, was not considered sufficient to prove selling at the trial, because the indictment contains no sales count (R. 1-2). The official who drew the affidavit evidently realized that manufacture, possession, transportation and selling are different offenses under the Statute and the proof of one does not establish the commission of another. It was only for the purpose of circumventing Section 25, Title II, of the National Prohibition Act that this evidence was used to establish selling. If the evidence would not be sufficient at a trial it was not sufficient for the search warrant. The search of a private dwelling is not a trivial matter. It involves punishment of a degrading character, and is inflicted as the result of *ex parte* proceedings. Since the warrant can be lawfully issued only for one offense, the evidence on which it is based should be at least admissible at a trial on an indictment charging that particular offense. *Simmons* v. *United States,* 18 Fed. (2d) 85, supra; *Wagner* v. *United*

*States*, 8 Fed. (2d) 581, 583 (C. C. A. 8 C.). For that purpose proof of actual sale on the premises would be necessary.

In the *Maccieno* case the brief of the Solicitor General comments with disapproval on a similar situation. The brief (p. 7) says:

> "Though the only ground upon which a warrant may be issued to search a private dwelling is that liquor is sold there, it is to be noticed that the information contained no count charging the defendant with the sale of liquor, except such as is incidental to the nuisance count."

The case at bar and the *Maccieno* case are substantially alike. The affidavits in the two cases have exactly the same defect in that neither contains any proof of sales on the premises. That the affidavit in the present case states more facts than the affidavit in the Maccieno case is immaterial. These facts are not relevant. As said in *In Re Phoenix Cereal Beverage Co.*, 58 Fed. (2d) 953, 955: "Insufficient facts contained in the affidavits do not make a search warrant valid."

In *United States* v. *Deloic*, 2 Fed. (2d) 377 (W. D. Wash.) the affidavit for the warrant to search a residence stated that the affiant had "seen automobiles call at said premises and take from same packages which from their shape, contour and size resembled containers holding intoxicating liquors."

This statement was held insufficient to satisfy Section 25. The Court said at page 377:

> "Section 25, Title II, N. P. A. * * * specifically provides that a search warrant shall not issue for the search of a private dwelling unless liquor is *unlawfully sold therein*." (Italics ours.)

In *United States* v. *Palma*, 295 Fed. 149 (D. C. Mass.), the affidavit stated that the affiant had smelled the odor of distilling in the private residence described, and that liquor was manufactured there for commercial purposes. The Court after commenting on the fact that the affidavit contained too many conclusions, held that evidence of manufacture on a commercial scale was not enough to justify the search of a dwelling. The opinion says at page 152:

> "As has been frequently pointed out in cases arising under the Prohibition Act, the search warrant is the most drastic instrument which can be placed in the hands of an officer, and when legislation is enacted extending the right to search and seize in private dwellings, the Courts ought not to lend their sanction to any interpretation of this legislation which will extend the right beyond the clear and obvious intent thereof."

That proof even of an actual sale made away from the dwelling by a person living there is not sufficient under Section 25, is held in *Thompson* v. *United States*, 22 Fed. (2d) 134 (C. C. A. 4 C.). The evidence was that the witness had bought a gallon of whisky from the husband of the defendant, apparently not then on the premises involved, though he lived there. The Court held that the affidavit was defective because it showed no sales on the premises. The opinion at page 134 says:

> "Conceding the allegations of the affidavit, the search was nevertheless not justified, under the federal law, for the use of the premises for the sale of intoxicating liquor was not shown."

And on page 135 it says:

> "The record fails to show either that the warrant was supported by evidence indicating a *prior sale on the premises*, or that it was issued by a court of record." (Italics ours.)

In *Jozwich* v. *United States*, 288 Fed. 831 (C. C. A. 7 C.) the Court held that proof of manufacture was not a proper basis for a warrant to search a residence. At page 832 the opinion reads:

> "The manufacture of illicit liquor in a house does not bring the case within the language of the Statute
> * * *
> "It is apparent from a reading of this section that Congress had in mind the distinction which has always existed (so far as search is concerned) between a dwelling house and a place of business. Since the time of Otis, back in Colonial days, the dwelling house, occupied as such, has been recognized as the owner's 'castle' and has not been the legitimate object of raids by government officials, unless the showing made before the Commissioner disclosed added facts not necessary in case the alleged illegal transaction occurred in a place of business."

An effort to circumvent section 25 was defeated in *Singleton* v. *United States*, 290 Fed. 130 (C. C. A. 4 C.). In that case a federal agent had made an affidavit before a state magistrate in South Carolina on which a warrant was issued to a constable for the search of a residence. The affidavit did not charge sales, but was sufficient under the state law. The federal agent assisted the constable in the search. In holding the search unlawful the Court says at page 133:

> "The law of South Carolina permits the issue of a warrant to search a private dwelling for forbidden liquor *although there is no evidence that any sales have been made from that house.*" (Italics ours.)

This language clearly shows that the Court thought proof of sales *made from the house* was necessary under the federal statute. On the same page the opinion says:

> "A federal officer can not lawfully swear out a search warrant to search a private dwelling when he has not

> the evidence of illicit sale without which the Act of Congress has expressly declared no private residence may be searched; and being inhibited from doing this under the federal statute, he can not evade such statute by swearing out the same before state officers."

The Respondent in the brief in opposition to certiorari (p. 13) cites *Kasprowicz* v. *United States,* 20 Fed. (2d) 506, which no doubt supports its contentions. But this case, like *Maccieno* v. *United States,* 9 Fed. (2d) 61, was decided by the same Court from which the case at bar has come and indicates the same views. *United States* v. *Berger,* 22 Fed. (2d) 867 (D. C. Mass.) and *United States* v. *Vottiero,* 25 Fed. (2d) 346 (S. D. N. Y.) cited by the Respondent, are in line with the *Kasprowicz* case. These seem to be the only cases found sustaining the position of the Respondent.

That the actual thing required by the Statute must be done on the premises to constitute guilt is held in *Miller* v. *United States,* 300 Fed. 529 (C. C. A. 6 C.), where it was held the use of an office, as a headquarters for supervising a liquor business, did not, when the liquor was not present, make it a place where liquor was kept or sold within the nuisance section (para. 21) of the National Prohibition Act. And in *United States* v. *Lefkowitz,* 52 Sup. Ct. Rep. 420, decided April 11, 1932, the Court said at page 422:

> "The mere soliciting of orders from the room in connection with the other uses alleged in the complaint is not sufficient to constitute the maintenance of a nuisance therein."

**Probable cause for one offense can not be supplied by proof of another offense.**

The Respondent relies on the definition laid down in *Dumbra* v. *United States,* 268 U. S. 435, 441, to support the finding of probable cause in this case. But in the *Dumbra*

case the finding upheld was based on convincing evidence of definite facts stated in the affidavit. Remote conclusions were not involved. The decision might be authority for the finding here if *proof of manufacture* were sufficient to justify the warrant. Proof, and very slight proof, of manufacture is all the affidavit contains. Probable cause in this case is regulated by section 25 Title II. And that section excludes proof of manufacture as a basis for a warrant to search a dwelling. If selling can be *inferred* from proof of manufacture, then section 25 is meaningless. With equal plausibility selling might be inferred from possession in quantity.

Apparently it is not even contended that the *Dumbra* case is authority for a finding here that liquor was sold on the premises. For the brief of the Respondent says (pp. 12-13) that section 25, Title II, is satisfied by a showing of probable cause that the house is being used for the sale of liquor, *whether such sale is consummated there or elsewhere.* Even if proof of sales elsewhere would be sufficient it can not help the Respondent here, because there is no proof whatever of a sale anywhere.

Remote conclusions from the facts are not permissible under the rule of probable cause. In *Baumboy* v. *United States,* 24 Fed. (2d) 512 (C. C. A. 9 C.) it was held that evidence showing that drug addicts frequented the house of the defendant did not justify a warrant to search the premises for drugs. The Court said at page 513:

> "Addicts presumably must lodge somewhere, and that these persons went there for a legitimate purpose is fully as reasonable as a contrary assumption."

In *Veeder* v. *United States,* 252 Fed. 415 (C. C. A. 7 C.), Judge Baker said at page 418:

> "The inviolability of the accused's home is to be determined by the facts, not by rumor, suspicion or guess-work."

**The narrow construction given to Section 25, Title II, reverses the principles of broad construction frequently laid down by the Supreme Court.**

The decision of the Circuit Court of Appeals in the present case certainly restricts the exemption in Section 25 Title II of the National Prohibition Act within narrow limits. The restriction is made almost meaningless because by the decision of the Court below selling may be inferred from other offenses which are themselves excluded as grounds for searching homes. It is inconceivable that in adopting section 25 Congress meant so little. It sought to place dwellings in a class by themselves. In doing so it gave practical application to a doctrine that had been prevalent in America for a century and a half. Lord Coke's maxim that a man's house is his castle had been used by Otis in his argument against general writs of assistance in 1761, when he said:

> "Now, one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and while he is quiet he is as well guarded as a prince in his castle."

In *Weeks* v. *United States,* 232 U. S. 283, the Court, after referring to writs of assistance, said at page 390:

> "Resistance to these practices had established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house is his castle."

The narrow construction of the immunity applied by the Circuit Court of Appeals reverses the principles of broad construction repeatedly applied by this Court in cases involving the Bill of Rights. These cases have definitely established the rule that the provisions of the Bill of Rights are to be broadly construed and protected against gradual

encroachments that seek to deprive them of their effectiveness. And it is in relation to the Fourth Amendment that this principle has been most frequently and most emphatically laid down.

*Boyd* v. *United States,* 116 U. S. 616, applied the Fourth and Fifth Amendments in a case where no actual search was involved, because the situation involved the same results as an illegal search and a compulsory disclosure of incriminating evidence. The rule was laid down (p. 635) that constitutional provisions for the security of person and property should be liberally construed. And as an answer to the argument that the words in section 25 "being used for the unlawful sale of intoxicating liquor," do not mean sales on the premises, we call attention to the following language of Mr. Justice Bradley at page 635 of the *Boyd* case:

> "A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance."

In *Gouled* v. *United States,* 255 U. S. 298, the Court says of the Fourth and Fifth Amendments at page 304:

> "It has repeatedly been decided that these amendments should receive a liberal construction so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of Courts or by well-intentioned but mistakenly overzealous executive officers."

In *Go-Bart* v. *United States,* 282 U. S. 344, the Court, in speaking of the Fourth Amendment, says at page 357:

> "The amendment is to be liberally construed, and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted."

And in *Byars* v. *United States,* 273 U. S. 28, the Court says at page 33:

> "The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and in the Colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality, but which, in reality, strike at the substance of the constitutional right."

Other cases to the same effect are *Weeks* v. *United States,* 232 U. S. 383, *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, and *Amos* v. *United States,* 255 U. S. 313. It is cases like these that have made the Bill of Rights a living force in the United States.

## CONCLUSION

The proceedings in the case at bar seem to involve the evils referred to in the cases last cited. They leave no force to section 6 of the Act of June 15, 1917. The construction that a general conclusion in the search warrant is a statement of the particular grounds or probable cause for its issual ignores the historical basis of the provision and deprives section 6 of the check intended on irregular searches. The ruling that selling or merchandising may be inferred from statements in an affidavit tending to show manufacture and stating a mere belief in transportation, may be classed as a "stealthy encroachment" on section 25 Title II of the National Prohibition Act. This encroachment practically destroys the section. The entire proceedings narrow the rights protected by the Fourth Amendment and by the Statutes enacted pursuant to it, and open the door to gross

abuse of the search warrant process. Both rulings are against the great weight of authority and are in conflict with *Maccieno* v. *United States,* 270 U. S. 629.

It is, therefore, respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

CHARLTON B. THOMPSON,
STEPHENS L. BLAKELY,
*Attorneys for Petitioner.*